Housing & Development Commission v Lee Chiaw Suan

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 36 OF 1994 (III)
ELIZABETH CHAPMAN JC
16 JUNE 1995

Civil Procedure *— Record of appeal — Magistrate's appeal — Whether record of appeal was served out of time — Rules of the High Court 1980 O 55 r 2(1) — Subordinate Courts Rules 1980 O 49 r 3A(3)*

A preliminary point was taken on this appeal from a magistrate's decision that the record of appeal was served out of time. The magistrates court notified the appellant by a notice dated 24 November 1994 that a certified copy of the grounds of the judgment was ready for collection. The memorandum of appeal was filed within 14 days, on 8 December 1994 and served on the respondent the same day. The respondent contended that the record of appeal was served on 3 January 1995, some 26 days outside the time specified in the Rules of the High Court 1980.

Held, dismissing the preliminary objection:

A memorandum of appeal was not part of the appeal record. It was to be filed separately under O 55 r 2(1) Rules of the High Court 1980 and in this case was correctly filed within 14 days of service of the notice in Form 141. The appeal record did not have to be served with the memorandum of appeal. Under O 49 r 3A(3) of the Subordinate Courts Rules 1980, the appeal record must be filed within six weeks. There was compliance with O 49 r 3A(3) in this case.

[Bahasa Malaysia summary

Satu bantahan permulaan telah diambil di dalam rayuan ini dari keputusan seorang majistret bahawa rekod rayuan telah disampaikan lewat. Mahkamah majistret memberitahu perayu melalui notis bertarikh 24 November 1994 bahawa satu salinan diakui sah alasan penghakiman sedia untuk dikutip. Memorandum rayuan telah difailkan dalam masa 14 hari, pada 8 Disember 1994 dan disampaikan kepada penentang pada hari yang sama. Penentang berhujah bahawa rekod rayuan telah disampaikan pada 3 Januari 1995, kira-kira 26 hari di luar tempoh masa yang diperuntukkan dalam Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak bantahan permulaan itu:

Satu memorandum rayuan bukanlah sebahagian daripada rekod rayuan. Ianya difailkan berasingan di bawah A 55 k 2(1) KMT

dan di dalam kes ini telah difailkan dengan betul dalam masa 14 hari selepas penyampaian notis dalam Borang 141. Rekod rayuan tidak perlu disampaikan dengan memorandum rayuan. Di bawah A 49 k 3A(3) Kaedah-Kaedah Mahkamah Rendah 1980, rekod rayuan mesti difailkan dalam masa enam minggu. Terdapat pematuhan A 49 k 3A(3) di dalam kes ini.]

Notes

For cases on record of appeal in civil procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 624–636; [1994] *Mallal's Digest* 235; [1995] *Mallal's Digest* 133–134.

Case referred to

Elayachee v Woo Siu Tip [1991] 3 MLJ 108 (refd)

Legislation referred to

Rules of the High Court 1980 O 55 r 2(3)
Subordinate Courts Rules 1980 O 49 rr 2(4), 3(2), 3A(3)

Michelle Ong (*Chua, Khaider & Co Advocates*) for the appellant.
Lina Wee (*Charles Ling Advocates*) for the respondent

Elizabeth Chapman JC: This is an appeal against the decision of the magistrates court delivered on 22 October 1994. At the hearing of this appeal learned counsel for the respondent raised a preliminary objection that the record of appeal was served out of time. The magistrates court had vide a notice dated 24 November 1994 notified the appellant that a certified copy of the grounds of judgment was ready for collection upon payment of RM49.30. The memorandum of appeal was filed on 8 December 1994 and served on the respondent the same day. The record of appeal was served on the respondent on 3 January 1995 and this, learned counsel for the respondent submitted, was 26 days outside the time specified in O 55 r 2(2) of the Rules of High Court 1980 ('the RHC').

Order 55 r 2 of the RHC states:

(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Learned counsel further submitted that it was mandatory on the part of the appellant to serve the record of appeal together with the memorandum of appeal on the respondent within 14 days of the receipt or service of the notice in Form 141.

A In this case the memorandum of appeal was filed and served within the 14-day period whereas the record of appeal was filed and served outside the 14-day period but within the six week period.

Now, a memorandum of appeal does not form part of the appeal record; it is to be filed separately under O 55 r 2 of the RHC and the B period stipulated in r 2(1) therein is 14 days from the date of service of the notice in Form 141. Under O 49 r 3A(3) of the Subordinate Courts Rules 1980, the period prescribed for the filing of the appeal record is six weeks (see *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108). The six-week period is clearly to enable the appellant to obtain and prepare the appeal record and to file it.

C In this case, as the appeal record was served within the six-week period as prescribed under O 49 r 3A(3) of the Subordinate Courts Rules 1980 and the memorandum of appeal was filed within 14 days of service of the notice in Form 141 in compliance with O 55 r 2(1) of the Rules of the High Court 1980 I hold that the appeal record was not D served out of time. The preliminary objection is therefore dismissed.

Preliminary objection dismissed.

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